September 4, 2019

EDUCATION LAW IS ALL WE DO.

kb kriha boucek

HB 3586 / PA 101-0515

Supplement to our August newsletter

Q — The law mentions a school organized under Article 34." What does this mean?

A — A school district organized under Article 34 means Chicago Public Schools. Most of the amendments contained in the bill were meant to *only* apply to CPS and there is a chance that the law will be amended during the upcoming veto session in order to change the amendments to apply to CPS only. Unless and until that happens, the new law applies to all public school districts in Illinois. We think that the best way to proceed is to assume that the changes will apply indefinitely.

Q — How do we count "3 school days?"

A — The law requires that "no later than 3 school days prior to an IEP meeting," the school must provide the child's parent/guardian with copies of all written material that will be considered by the IEP team during the meeting.

Let's say the meeting was on Friday, August 23rd.

Without counting the meeting date, the 3rd school day prior to the 23rd was the 20th. Since the law states "no later than," we recommend that the team provide the materials to parent on August 19th.

Q — I heard that the timeline is 5 school days instead of 3.

A — The original timeline was indeed 5 school days, but this was reduced to 3 school days near the end of the legislative process.

Q — When does the law take effect?

A — The law became effective immediately when it was signed by the Governor on August 23, 2019.

Q — What if the IEP meeting is scheduled with less than 3 school days' notice?

A — In situations where the parent waives the required 10 calendar days' notice, the law specifically provides that the written materials should be sent to parent "as soon as possible" in advance of the IEP meeting.

Q — What exactly must be provided to a parent/guardian before an IEP meeting?

A — "All written material that will be considered by the IEP team … so that the parent may participate in the meeting as a fully-informed team member" except for materials related to placement and related services. This will generally include:

- Present levels of performance
- Evaluations, reports, etc.
- Data and goal progress updates
- Goals/objectives
- Accommodations
- Transition plan / summary of performance
- Attendance, grades and disciplinary records
- FBA and BIP
- MDR (only the section describing the event)

The law allows the placement and related services pages to be removed from the materials provided in advance of all IEP meetings (initial and reeval) since these decisions must be made by the full IEP team. Otherwise, making these decisions in advance of a meeting could be construed as an improper predetermination (more on this follows).

Q — What if the IEP meeting is being held to determine a student's initial eligibility?

A — For initial eligibility IEP meetings, school districts are not legally required to send draft goals home in advance. For initial eligibility meetings, only the evaluations, assessments and existing data should be sent to parent/guardian in advance of the meeting.

The ISBE rules have always allowed a brief 'pause' for the IEP team to reconvene a meeting within 30 calendar days after a student is found eligible under IDEA to draft the student's IEP summary. 23 Ill.Adm.Code 226.110(j). But keep in mind there remains a hard deadline of 60 school days from the date of consent to complete eligibility and the IEP.

School personnel should use their best judgment in these situations. Nothing prevents the IEP team from moving immediately from eligibility to drafting an IEP for a student who has just been found eligible. Similarly, nothing prevents an IEP team from drafting goals, etc., in advance of an initial eligibility for a student, *e.g.*, a student with a low incidence diagnosis entering from Early Intervention (EI).

However, if school personnel believe that a 'pause' between the eligibility and IEP meetings will allow parent to be a more fully-informed team member, then the IEP portion of the meeting should be conducted on a separate date within 30 calendar days. In this case, the parent would receive all written materials at least 3 school days prior to the reconvened IEP meeting.

Q — What if the IEP meeting is a reevaluation?

A — This is tricky. What if the team finds the student not eligible during the reevaluation IEP meeting, but draft updated goals were sent to parent in advance?

Generally speaking, for a reevaluation meeting, the team should only send home evaluations, reports, data, goal progress updates, etc., in advance. If the student continues to be eligible, the team generally develops new goals working from the student's old goals, which parent would have previously received copies of.

School personnel should convey a willingness to wait to reconvene the IEP meeting to draft the IEP in situations where it will allow, assist or encourage a parent to be a more fully-informed team member.

Q — What about domain forms?

A — A domain meeting is not considered an IEP meeting. For this reason, we do not believe that a completed domain form is required to be provided to parent in advance of a domain meeting. A school team can voluntarily choose to provide the blank domain form to parent/guardian in advance of a domain meeting to help encourage discussion.

Q — Must eligibility criteria forms be sent to parents in advance?

A — This question has generated a great deal of discussion among us because it seems the height of predetermination to send home hand selected eligibility criteria forms, especially for an initial eligibility IEP meeting. In thinking this through, we suggest that school districts consider sending home all of the eligibility forms in advance of initial IEP meetings. This seems to be the most consistent and straight-forward approach.

The same practice can apply for reevaluation meetings for consistency. Otherwise, the team can choose to only send home the eligibility criteria that the student currently qualifies for. We suspect it will be easiest to get in the habit of sending all eligibility forms home in advance for initial and reevaluation meetings.

Q — What if the IEP team develops new goals at the table. Does parent have to agree with them?

A — No. Implementing the law should not interfere with the dynamic nature of IEP team discussions or the ability to respond (quickly and adeptly) as a collaborative team. 'Violating' this new law will generally constitute a procedural error that will not result in a denial of FAPE. That said, a procedural error can rise to the level of a more egregious 'substantive error' in situations where it causes substantive harm to a student or *impedes a parent's opportunity to meaningfully participate as a member of their child's IEP team*. This is critical to guard against.

The same rationale would apply to drafting a new goal suggested by parent/guardian at the IEP table. To refuse to do so would turn the very purpose and intent of IDEA on its head and send a message to parent/guardian that they are not a member of the IEP team. This is, of course, one of the most confounding problems with the new law – it emphasizes technical 'form over substance'.

Q — Our school social worker has a practice of only drafting goals at the IEP table. Is she now required to draft goals in advance?

A — Probably, yes. The law requires that school personnel send home written materials that will be reviewed at the meeting. We can try to take the position that the law does not require school personnel to create written materials in advance, but the rationale behind the new law presents a strong argument for disclosure in advance. We suggest that all related service providers prepare at least one draft goal to be sent home prior to the meeting to allow for a starting point for discussions during the meeting.

Q — Must written materials be sent to both parents three days in advance?

A — Generally, yes. Section 5/10-21.8 of the *Illinois School Code* requires that in the absence of a court order to the contrary, both parents are entitled to reports and student records *upon request*. If a parent has requested his or her child's records, written IEP materials should be provided to that parent. In situations where a parent has not requested records, school personnel can use their best judgment.

Q — Can we send written materials to a grandparent or other person acting in the place of a parent in advance of the IEP meeting?

A — The IDEA defines a parent as "an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives." School personnel can legally send written materials in advance to an individual acting in the place of a parent. When in doubt, it is advisable to obtain a parent's written consent to share records.

Q — Must the written materials be sent home in the native language used by the parent?

A — No. ISBE provides IEP paperwork in English and Spanish on its website; if parent's native language is Spanish, the written materials can be provided in advance in Spanish only if feasible. School districts are required to "take whatever action is necessary to facilitate the parent's understanding of and participation in the proceedings *at a meeting*, including arranging for and covering the expense of an interpreter for parents whose native language is other than English…." 23 Ill.Adm.Code §226.530.

Q — How about procedural safeguards?

A — Procedural safeguards, on the other hand, have been prepared by ISBE in 10 languages and should be provided in the parent's native language when feasible. A copy of the procedural safeguards must be provided to parent [23 Ill.Adm.Code 226.510] only one time per school year, except also as follows [34 CFR 300.504(a)]:

- Initial referral / request for evaluation
- Receipt of the first ISBE complaint
- Receipt of the first due process complaint
- When the student is disciplined
- When requested by parent

Q — Can the written materials be sent to parent electronically?

A — Yes. Sending the email message as a 'read receipt' is one way to prove delivery, although the 'read receipt' can be declined. We recommend that you obtain written parental consent to send materials via email. If parent does not have an email address (or does not regularly access email messages), then we suggest sending the paperwork home in a sealed envelope with the student or hand delivery to the parent. If the student is not attending school or it is not advisable to send paperwork home with the student, regular U.S. mail will suffice. If sending via U.S. mail, the envelope probably needs to be mailed a week in advance to allow adequate time for delivery. School personnel should maintain written evidence proving delivery when possible.

Q — What if a parent won't attend the IEP meeting because they didn't receive the written materials at least 3 days in advance?

A — The decision on how to proceed in these situations will involve a judgment call. If the team can prove that the parent received the written materials at least 3 school days in advance of the meeting, then the meeting can proceed as scheduled. This is especially advisable when the team is up against a timeline.

If the team is not up against a timeline, they will need to make a judgment call whether to convene the meeting or not. Remember that IDEA emphasizes parental participation. When in doubt, making decisions that encourage and support parental participation will usually carry the day.

Q — Doesn't this new law encourage or at least suggest that predetermination is happening?

A — Yes, we think that it does. When the U.S. Department of Education issued its updated regulations after the 2004 IDEA Reauthorization, it stated in rather circular but prescient fashion [71 Fed. Reg. 46,678 (2006)]:

"*We do not encourage public agencies to prepare a draft IEP prior to the IEP meeting, particularly if doing so would inhibit a full discussion of the child's needs. However, if a public agency develops a draft IEP prior to the IEP meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents. The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP meeting, and be better able to engage in a full discussion of the proposals for the IEP.*"

Q — What are the key takeaways from that statement by the DOE?

A — Don't do it, but if you do it, then make yourself clear and don't make any hard and fast decisions in advance of the meeting proper. To this end, using the DOE statement above as our guide, we suggest that you insert a statement at the beginning of the IEP meeting notes section that says something to the effect of:

- *On [date], parents were provided with draft copies of the written materials to be discussed at this IEP meeting via [delivery method] as required by law. This draft copy contained preliminary recommendations for review and discussion so as to give parents an opportunity to gain insight into the suggestions and recommendations of school personnel prior to the IEP meeting. Providing these draft written materials in advance of the meeting was designed to allow parents to be better able to engage in a full discussion of the proposals for their child's IEP and was not meant to predetermine any aspect of their child's IEP programming or services.*

Q — Any suggestions on how we can avoid the appearance of predetermination?

A — IEP meeting notes will continue to provide critically important insight into the discussions at the IEP table and should contain examples of:

- How parents meaningfully participated in the IEP discussions
- Revisions or changes that the IEP underwent based on parents' input and/or private evaluations, etc.
- Willingness of school personnel to discuss parents' concerns
- How the team kept an open mind about issues in dispute
- The IEP team's consideration of multiple placement options
- How school personnel actively solicited a parent's input during the IEP meeting

We anticipate that 'predetermination' cases will take on a different complexion now that written materials must legally be provided to parents in advance of IEP meetings. In other words, we (perhaps optimistically) think that hearing officers will have a more difficult time finding 'predetermination' has occurred simply because the school district was following the law. Generally speaking, predetermination cases tend to focus on placement determinations.

We are undoubtedly nearing the 'tipping point' whereby school personnel are spending more time complying with procedural safeguards than serving children. Just keep in mind that most of these amendments to the *School Code* were written as a result of the actions of CPS and not all school districts in the state. It is possible that these amendments will be revised moving forward to ease the administrative burden they create.

Continue to focus on the fact that the changes were designed to help parents participate in their children's IEP meetings more fully and in possession of the same information that school personnel have, which is a goal and purpose that we can all agree on.

Q — What related services must be logged?

A — Creating and maintaining service logs for all 'standard' related services is a common practice that is now required by law. Medicaid billing is typically submitted in 15 minute increments, evidence of which can serve as the required log. Specific time of day (*e.g.*, 12:10 – 12:40 p.m.) and specific goals worked on are not required to be contained in the logs (although both are generally considered good practices).

The new law requires that the logs contain the *type* of related service and the *minutes* that were provided. We think the use of the word "log" implies that the *date* that the related service was provided must also be included. The *Illinois School Student Records Act* was simultaneously amended to provide that related service logs are considered part of a student's temporary school student record.

- *Consult minutes?* Although we recognize the complexity of how consult services are delivered, we believe that the new law requires logs to be maintained for both direct and consult related service minutes.

- *Hearing Itinerant / Vision Itinerant services?* If HI or VI services are listed in the 'placement' section of an IEP, no log is required. If these services are listed as a related service, a log must be maintained.

- *Transportation?* IEP programs are usually coded to insert transportation as a related service (which it is). Practically speaking, we do not believe that minutes need to be logged for transportation; this is simply not practical. However, if the district's buses and vehicles feature GPS tracking, we suggest that this data be maintained and provided to parents upon request.

- *Nursing services?* Nurses/health aides must log the services provided, the date and the minutes administered.

- *EL services?* Services for English Learners are not considered related services and a log is not required.

- *Resource minutes?* Resource services are not considered related service minutes and need not be logged by school personnel.

Q — Do school districts have a responsibility to notify parents about the new law?

A — Yes. School districts must inform parents of their right to request related service logs within twenty school days of the start of each school year or at the establishment of a student's IEP. Each school district can decide how to communicate this information, which can be by individual letters/emails to parents of students with IEPs, in a newsletter sent to all families, included on the district's website, etc. Sample notice language follows:

- *School personnel who provide related services to students are required to maintain written logs that contain the service provided, the date and the number of minutes administered. These related service logs must be provided to parents/guardians during the student's annual review IEP meeting and also anytime upon request. These service logs are considered part of a student's temporary school records.*

Q — Does the new law require parents to provide the school team members with written materials they obtain in advance of the meeting?

A — No. The law is silent on the reverse situation when parents obtain a private evaluation or other written information about their child. In these situations, the parents can simply bring the private evaluation, etc., to the IEP meeting itself. IEP teams cannot impose any 'advance notice' requirements on parents.

Depending on the significance and complexity of the written materials provided by parent, the IEP team can move ahead with its review and discussion of those materials at the same meeting, or they can properly reconvene the IEP meeting at a later date to review the materials provided.

Q — Must the related service logs be incorporated into the student's IEP?

A – The logs must be provided to parents at annual review IEP meetings or upon request. The IEP annual review notes can simply reflect that parents were provided with copies or the logs can be scanned into the IEP system. Either practice is defensible.

Q — Are there any additional special education posting or notification requirements that we need to be aware of?

A — Yes. The *Illinois School Code* (105 ILCS 5/14-6.01) was recently amended to require that the following information be posted on a school district's website and included in its student handbook or a newsletter beginning with the 2019-2020 school year:

- *Students with disabilities who do not qualify for an individualized education program under the federal Individuals with Disabilities Education Act, may qualify for services under Section 504 of the federal Rehabilitation Act of 1973 if the student (i) has a physical or mental impairment that substantially limits one or more major life activities, (ii) has a record of a physical or mental impairment, or (iii) is regarded as having a physical or mental impairment. Questions about the identification, assessment and placement of students should be directed to [name] [title] at [phone number].*

Q — What happens if there is a delay in the delivery of a student's related service minutes?

A — The new law provides that if a student's related service and/or IEP services (*i.e.,* instructional minutes and the like) are not administered within 10 school days after they are scheduled to be administered, then the school district must provide parent/guardian with written notification:

- Within 3 school days after non-compliance; in other words, 13 school days (10 + 3) after the IEP service was scheduled to be delivered but was not
- That describes the IEP services that have not been delivered to the student
- That includes information regarding the parents' ability to request compensatory education services

We recommend that the letter describe in detail, if known, the school district's plan and timeline for the provision of the compensatory education services to the student along with contact information if parent/guardian has questions or concerns.

Importantly, the 10 school day timeline in this section does not include days when the student is absent or otherwise unavailable to receive the IEP service(s) in question. The statute makes this distinction because, generally speaking, IEP services, including related service minutes, are not required to be 'made up' when the student is absent. Exercise caution relating to home/hospital instruction; in these situations, the IEP team must determine what IEP and related services will be provided to the student during the home/hospital period.

This new requirement makes it now even more imperative that case managers and building administrators closely monitor staff members' implementation of IEP services. The shortage of staff that many school districts are experiencing will not help matters.

Q — Does the new law impact RtI or MTSS?

A — Yes. The legislature passed an entirely new section of the *School Code* addressing response to scientific, research-based intervention (RtI) and multi-tiered systems of support (MTSS).

First, the new statute defines RtI and MTSS as:

"[A] tiered process of school support that utilizes differentiated instructional strategies for students, provides students with scientific, research-based interventions, continuously monitors student performance using scientifically, research-based progress monitoring instruments, and makes educational decisions based on a student's response to the interventions" …

— which both —

"use a problem-solving method to define the problem, analyze the problem using data to determine why there is a discrepancy between what is expected and what is occurring, establish one or more student performance goals, develop an intervention plan to address the performance goals, and delineate how the student's progress will be monitored and how implementation integrity will be ensured."

105 ILCS 5/14-8.02g(a).

Q — Does the law require when RtI and MTSS must be utilized?

A – Yes [105 ILCS 5/14-8.02g(b)]:

"A school district must utilize [RtI or MTSS] as part of an evaluation procedure to determine if a child is eligible for special education services due to a specific learning disability" (*emphasis added*).

"A school district may utilize the data generated during the [RtI or MTSS] process in an evaluation to determine if a child is eligible for special education services due to any category of disability" (*emphasis added*).

Q — So far, so good. Any other changes?

A **—** Yes. RtI and MTSS must involve a collaborative team approach, with parents as part of the collaborative team [105 ILCS 5/14-8.02g(b)]:

"The [RtI or MTSS] process must involve a collaborative team approach, with the parent or guardian of a student being part of the collaborative team. The parent or guardian of a student must be involved in the data sharing and decision-making processes of support under this Section. The State Board of Education may provide guidance to a school district and identify available resources related to facilitating parental or guardian participation in the response to [the RtI and MTSS] process."

This is confounding. All students receive Tier I supports. Must all parents be involved in deciding what Tier I supports will be provided to their children? These decisions are pedagogical in nature and are made by educators who are expertly trained to do so. We suspect that the statute was meant to involve parents in Tier 2 and 3 discussions. Until ISBE issues written guidance, we recommend that you continue to use your current approach of notifying and involving parents in RtI and MTSS discussions, but that you increase your communications with parents regarding the process.

Q — Does the statute address child find?

A – Yes [105 ILCS 5/14-8.02g(d)]:

"Nothing in this Section affects the responsibility of a school district to identify, locate, and evaluate children with disabilities who are in need of special education services in accordance with the federal Individuals with Disabilities Education Improvement Act of 2004, this Code, or any applicable federal or State rules."

This new statutory language essentially adopts the Office of Special Education and Rehabilitative Services (OSERS) letter dated January 21, 2011 on the same topic. In sum, a case study evaluation (initial or reevaluation) cannot be delayed or denied on the sole basis that the school is utilizing an RtI or MTSS process for the student.

kriha kb boucek

2 TransAm Plaza Dr., Suite 450 • Oakbrook Terrace, IL 60181
krihaboucek.com • 630.394.3790

Our Attorneys

b		Sara **Boucek**	sara@krihaboucek.com Direct: (630) 394-3792
g		Kevin **Gordon**	kevin@krihaboucek.com Direct: (630) 394-3784
j		Stephanie **Jones**	stephanie@krihaboucek.com Direct: (630) 394-3786
k		Laura **Knittle**	laura@krihaboucek.com Direct: (630) 394-3783
k		Darcy **Kriha**	darcy@krihaboucek.com Direct: (630) 394-3782
l		Mohammed **Lakhani**	mohammed@krihaboucek.com Direct: (630) 394-3785
s		Rob **Swain**	rob@krihaboucek.com Direct: (630) 394-3788

Kriha Boucek LLC is an education law firm that represents boards of education, public school districts, special education cooperatives, charter schools, and private schools. This is attorney advertising and should not be considered legal advice. Please contact an attorney for advice on specific legal issues.